

Yitai Hu (SBN 248085) (yitai.hu@alston.com)
 Sean P. DeBruine (SBN 168071) (sean.debruine@alston.com)
 S.H. Michael Kim (SBN 203491) (michael.kim@alston.com)
 C. Augustine Rakow (SBN 254585) (augie.rakow@alston.com)

ALSTON + BIRD LLP

Two Palo Alto Square
3000 El Camino Real, Suite 400
Palo Alto, California 94306
Telephone: 650-838-2000
Facsimile: 650-838-2001

T. Hunter Jefferson (admitted pro hac vice) (hunter.jefferson@alston.com)

ALSTON + BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
Telephone: 404-881-7333
Facsimile: 404-253-8863

Attorneys for Plaintiff and Counterdefendant
ELAN MICROELECTRONICS CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ELAN MICROELECTRONICS
CORPORATION,

Plaintiff,

V.

APPLE, INC.,

Defendant.

Case No. C-09-01531 RS

**DECLARATION OF SEAN P. DEBRUINE
IN SUPPORT OF ELAN CORPORATION'S
MOTION TO COMPEL PRODUCTION OF
SOURCE CODE PURSUANT TO L.R. 3-
4(A)**

[Civil L.R. 7-2(d), 7-5]

APPLE, INC.,

Counterclaimant,

$$V.$$

ELAN MICROELECTRONICS
CORPORATION,

Counterdefendant.

1 I, Sean P. DeBruine, declare as follows:

2 1. I am a partner in the law firm of Alston & Bird LLP, counsel to Plaintiff Elan
3 Corporation ("Elan"). I make this declaration in support of Elan's Motion to Compel Production of
4 Source Code Pursuant to Patent L.R. 3-4(a) ("Motion to Compel"). I have personal knowledge of the
5 following facts, except those facts stated on information and belief, which facts I believe to be true. If
6 called to testify I could and would testify competently to the matters stated herein.

7 2. Attached as **Exhibit A** is a true and correct copy of an excerpt of Apple's Responses and
8 Objections to Elan First Set of Requests for Documents [Nos. 1-65] at 1 and 15-17, as served on Elan
9 on September 9, 2009.

10 3. Attached as **Exhibit B** is a true and correct copy of Apple's Invalidity Contentions and
11 Accompany Document Productions as served on Elan on December 7, 2009.

12 4. Attached as **Exhibit C** is a true and correct copy of *Cryptography Research Inc. v. Visa*
13 *Int'l Serv. Ass'n*, No. 04-4143, 2005 U.S. Dist. LEXIS 37103 (N.D. Cal. Jul. 27, 2005).

14 5. Attached as **Exhibit D** is a true and correct copy of *Forterra Systems, Inc. v. Avatar*
15 *Factory*, No. 5-5572, 2006 WL 2458804 (N.D. Cal. Aug. 22, 2006).

16 6. On August 6, 2009, my client Elan served a First Set of Requests for Documents and
17 Things [Nos. 1-65].

18 7. On September 30, 2009, the parties agreed on December 7, 2009 as the
19 deadline to produce source code pursuant to Patent Local Rule 3-4(a).

20 8. On November 17, 2009, my client Elan agreed to Apple's request that the
21 parties produce source code by making it available for inspection, under certain terms, at
22 the offices of the producing parties' outside counsel.

23 9. On December 16, 2009, I received an email from Apple's counsel stating as
24 follows:

25 As stated in Apple's invalidity contentions and our subsequent discussions, we are in the
26 process of identifying non-source code documents that may show the relevant
27 functionalities. We were looking forward to Elan's supplemental infringement
28 contentions to give us better sense of Elan's infringement theories and what
functionalities and documents will be relevant to those theories. Unfortunately, Elan's
infringement contentions continue to fall short in a number of areas (an issue we will
address by separate email shortly). That said, we expect to produce this week technical

1 documents relating to the accused functionality, as best understood based on Elan's
2 current contentions.

3 With respect to source code, I explained on Friday that Apple will do its best to make
4 source code available for inspection as soon as possible once a protective order is entered,
5 but that we may not be able to make code available before the holidays. As I explained,
6 Apple has rigorous internal procedures governing source code inspections. These
7 procedures require executive-level authorization for the release of code for inspection
8 pursuant to the entered protective order and that someone from Apple's in-house litigation
9 team personally fly the source code to Boston. Given these procedures and Apple's
10 corporate shut-down over the holidays, we may not be able to make code available for
11 inspection until after the holidays. . . . In any event, as I explained on Friday, we will do
12 our best to make source code available for inspection as soon as we can. We are
13 coordinating with Apple's in-house legal team to expedite that process as much as
14 possible and will let you know as soon as we can when the code will be available. In the
15 interim, we hope to get back to you tomorrow on the issues you raised during our call
16 Friday regarding finalizing the protective order.

17 10. On December 29, 2009, I received a letter from Apple's counsel stating as follows:

18 Elan agreed to provide supplemental contentions that would provide at least its theory as
19 to how the[] chips and/or software modules actually identify the maxima or minima . . .
20 But Elan's supplemental contentions do none of that . All Elan has alleged now is that
21 some sort of "firmware modules running on the Broadcom controller filter the
22 capacitance data to create a data structure representing the finger contacts with the touch
23 sensor" and that "the firmware examines these signal values to identify a first maxima in
24 a signal corresponding to a first finger, identify a minima following the first maxima, and
25 identify a second maxima in a signal corresponding to a second finger following the
26 minima." This is not a meaningful supplementation. . . . Elan has provided no additional
27 detail as its infringement theory. As a result, Apple is still left to guess how Elan believes
28 Apple's products are alleged to infringe.

11. On January 12, 2010, I conferred with Apple's counsel by telephone regarding
outstanding discovery disputes, including Apple's failure to produce source code pursuant to Patent
L.R. 3-4(a). Apple's counsel stated that Apple's counsel were unable to provide a date by which Apple
can provide the source code.

I declare under penalty of perjury under the laws of the State of California and the United States
of America that the foregoing is true and correct. Executed on January 13, 2010 in Palo Alto,
California.

/s/ Sean P. DeBruine
SEAN P. DEBRUINE